U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: DEC 0 5 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), approved the immigrant visa petition and certified the matter to the Chief, Administrative Appeals Office (AAO). The AAO withdrew the director's decision and denied the petition. A corporation that claims to be the petitioner's successor-in-interest now appeals the AAO's decision. Pursuant to the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*), the AAO will reject the corporation's submission as improperly filed.

A director may certify a decision to the AAO "when the case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1). Certification to the AAO may occur "only after an initial decision is made." 8 C.F.R. §§ 103.4(a)(4), (5).

The petitioner was a software consulting company that sought to permanently employ the beneficiary in the United States as a software engineer. On October 5, 2012, the director approved the petition, which requests classification of the beneficiary as an advanced degree professional under section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A), and certified his decision to the AAO.

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is March 18, 2011. *See* 8 C.F.R. § 204.5(d).

In his Notice of Certification, also dated October 5, 2012, the director stated that the petition involves "a novel issue": whether classification as an advanced degree professional requires the beneficiary's U.S. advanced degree to be issued by an accredited university.

On February 12, 2013, the AAO withdrew the director's decision and denied the petition. The AAO found that U.S. Citizenship and Immigration Services (USCIS) regulations imply an accreditation requirement for U.S. advanced degrees and that the U.S. university that the beneficiary attended lacked accreditation when it issued his master's degree.

On March 15, 2013, [redacted] "appealed" the AAO's decision, claiming to be the petitioner's successor-in-interest. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986) (explaining the conditions under which an entity that acquires the essential rights and obligations needed to carry on a labor certification employer's business can continue to offer a job opportunity for immigration purposes).

[redacted] asks the AAO to withdraw the director's certification and remand the case for issuance of a new Notice of Certification. [redacted] claims that the petitioner and its counsel, who also represents [redacted] did not receive a Form I-290C, Notice of Certification. *See* 8 C.F.R. § 103.4(a)(2) ("the official certifying the case shall notify the affected party using a Notice of Certification (Form I-290C)."). Alternatively, [redacted] asks the AAO to treat its "appeal" as a motion and grant counsel 30 days in which to submit a brief to support the motion.

On September 13, 2013, the AAO issued a Notice of Intent to Dismiss (NOID) the filing to and counsel. The notice informed them that the AAO lacks authority to adjudicate appeals of its own decisions. *See* U.S. Dep't of Homeland Sec. Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003) (granting USCIS the authority to adjudicate only the appellate matters in the former regulation at 8 C.F.R. § 103.1(f)(3)(iii) (2002)).

The notice also informed and counsel that the AAO can accept a filing only from an "affected party." *See* 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*) (the AAO must reject an appeal filed by a person or entity not entitled to file it). The NOID stated that the AAO intends to reject the filing unless demonstrates a successor relationship to the petitioner, in which case the AAO may accept the filing as a motion to reopen.

Successor-in-Interest

Under *Dial*, a successor-in-interest must: provide detailed evidence of the terms of its acquisition of the labor certification employer; demonstrate that the job opportunity remains the same as stated on the labor certification; and establish its eligibility for the immigrant visa petition in all respects, including the continuing ability of it and the labor certification employer to pay the proffered wage from the petition's priority date onward. *See Dial*, 19 I&N Dec. at 482-83.

filing included a copy of a November 16, 2012 merger agreement between it and the petitioner. chief executive officer (CEO), whom the agreement also identified as the petitioner's CEO, signed the merger agreement for both and the petitioner. The agreement, which was effective December 1, 2012, appeared self-serving and invalid because CEO signed the document for both parties. Therefore, the AAO, in its NOID, requested evidence of the authorization of CEO to sign the merger agreement for the petitioner. The AAO also requested additional evidence of the merger, which the agreement states occurred through stock acquisition.

In response to the AAO's NOID, submits a copy of a written, corporate action, dated June 16, 2012. The action purports to remove the petitioner's president as a director and officer of the petitioner, and a third company, as of June 21, 2012.[1] The agreement also purports to appoint CEO as sole director of all three companies.

[1] According to the U.S. Attorney's Office in Delaware, 2 days before the June 16, 2012 corporate action, the petitioner's president pleaded guilty to visa fraud and money laundering charges, admitting that he submitted false contracts to USCIS on 33 occasions from March 2007 through September 2010 to demonstrate available work for nonimmigrant beneficiaries of H-1B visa petitions. *See* "Foreign National Pleads Guilty to Visa Fraud," June 14, 2012, *available at* http://www.justice.gov/usao/de/news/2912/doppalapudi.html (accessed Nov. 27, 2013). Federal court records show that the petitioner's president was sentenced on September 26, 2012 to 16 months in prison. *See United States v. Doppalapudi*, No. 12-00024 (D. Del. 2012). A copy of 2012 federal tax return states that the petitioner's president holds about 12.5 percent of stock, with Streamline's CEO owning the remaining shares of the company.

The corporate action identifies its signers as all of the shareholders of the petitioner, and The agreement is signed by the petitioner's former president and CEO, whom the action identifies as the president and authorized representative of

does not provide any further information or evidence about or its shareholders. Online information from the Delaware Department of State, Division of Corporations, states that was formed on February 16, 2012 and identifies CEO as the company's registered agent. *See* "Entity Detail," Del. Dep't of State, Div. of Corps., *available at* https://delecorp.delaware.gov/tin/controller (accessed Nov. 27, 2013).

In a written statement dated October 10, 2013, CEO states that the petitioner merged into and that all of the petitioner's assets, including its "business intangibles, customer lists and contracts, all personal property within the offices, all human resources including employees/professional consultants, and all intellectual and proprietary property," passed to Copies of the beneficiary's monthly payroll records from January 2011 through July 2013 indicate that he worked for the petitioner until December 2012, when he began working for

Although has not provided information about or additional evidence regarding the disposition of the petitioner's assets to corroborate the claimed merger, the AAO finds that the preponderance of the evidence establishes that the petitioner merged into effective December 1, 2012.

As indicated above, a successor-in-interest must also establish the continuing ability of it and the labor certification employer to pay the beneficiary's proffered wage from the petition's priority date, continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

In the instant case, the proffered wage for the offered position of software engineer stated on the labor certification is $80,000 per year. Copies of the petitioner's annual reports, federal tax returns, or audited financial statements for 2011, the year of the petition's priority date, were unavailable on the petition's filing date of October 26, 2011. Copies of the petitioner's 2010 federal income tax return, the 2010 Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement that it issued to the beneficiary, and monthly payroll records of its employment of the beneficiary from January 2011 through August 2011 accompanied the petition.

The AAO's NOID, pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), requested copies of the petitioner's annual report, federal tax returns, or audited financial statements for 2011 and 2012, and the same documents of for 2012. In response, submits copies of the petitioner's 2011 federal tax return, 2012 federal tax return, and copies of the

beneficiary's monthly payroll records from January 2011 through July 2013, which indicate that he worked for the petitioner until December 2012, when he began working for [2]

does not submit copies of the petitioner's 2012 annual report, federal tax return, or audited financial statements as the regulation at 8 C.F.R. § 204.5(g)(2) requires and as the AAO requested in its NOID. Nor does indicate that the petitioner's 2012 records are unavailable or inapplicable. *See* "Publication 542: Corporations," U.S. Dep't of Treasury, Internal Revenue Serv., p. 5, (Mar. 2012), *available at* http://irs.gov/pub/irs-pdf/p542.pdf (accessed Nov. 27. 2013) (unless exempt from income taxes, all U.S. corporations in existence for any part of a tax year must file an income tax return, even if they did not earn taxable income).

In "appropriate cases," USCIS may consider or request additional evidence of a petitioner's ability to pay the proffered wage, such as copies of payroll records. 8 C.F.R. § 204.5(g)(2). But a petitioner may not substitute additional materials for evidence that the regulation at 8 C.F.R. § 204.5(g)(2) requires. Therefore, the copies of the beneficiary's payroll records do not establish the petitioner's ability to pay his proffered wage in 2011.

In addition, does not submit copies of the beneficiary's 2011 and 2012 Forms W-2, as the AAO's NOID suggested. The AAO considers Forms W-2 more reliable evidence of a beneficiary's employment than payroll records because employers must submit Forms W-2 to the U.S. government subject to penalties for failing to file or reporting incorrect information. *See* U.S. Dep't of Treasury, Internal Revenue Serv., "General Instructions for Forms W-2 and W-3," p. 11, (Mar. 8, 2013), *available at* http://www.irs.gov/pub/irs-pdf/iw2w3.pdf (accessed Nov. 27, 2013).

Because has not provided complete annual reports, federal tax returns, or audited financial statements of the petitioner for each year from the priority date until the merger and has not explained the absence of the documentation, has failed to demonstrate the continuing ability of it and the petitioner to pay the beneficiary's proffered wage from the petition's priority date onward.

As indicated above, a successor-in-interest must also demonstrate that it continues to offer the beneficiary the job opportunity specified on the labor certification. Counsel asserts that the beneficiary works for in the same position - business analyst (SAP Finance) - as he did for the petitioner. As discussed above, copies of the beneficiary's payroll records show that he has worked for since the December 1, 2012 merger.

The labor certification states different job duties, which involve different technologies, for the offered position of software engineer and the beneficiary's current position of business analyst (SAP Finance).

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[2] response to the AAO's NOID included a letter from counsel, dated October 11, 2013, stating that the response contains a copy of the petitioner's "2012 U.S. Corporate Income Tax Returns" at Exhibit P. Exhibit P, however, contains only a copy of the petitioner's 2011 federal tax return.

For example, the labor certification states that the offered position involves "using various modules of SAP and/or other technologies such as Oracle and Java (J2EE) applications." But the job duties of the beneficiary's current position, as stated on the labor certification, do not include Oracle and Java (J2EE) applications among the "software and tools used."

has not submitted any documentary evidence that it intends to employ the beneficiary in the offered position as the AAO's NOID requested. Evidence of employment of the beneficiary in his current position does not establish that intends to employ him in the offered position. Therefore, the record does not establish that the job opportunity remains the same one that the DOL certified.

For the foregoing reasons, has not demonstrated that it is a successor-in-interest to the petitioner. Because has not established that it is a successor-in-interest to the petitioner, Streamline is not an "affected party" in this matter. Therefore, pursuant to the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*), the AAO cannot accept its filing.

Notice of Certification

Even if established itself as a successor-in-interst to the petitioner, the record does not demonstrate that USCIS failed to notify the petitioner of the director's certified decision as the regulation 8 C.F.R. § 103.4(a)(2) requires. The record also does not establish that a violation of the regulation at 8 C.F.R. § 103.4(a)(2) would merit a remand to the director for issuance of a new Notice of Certification.

An addressee is presumed to receive ordinary mail that is properly sent. *See Santana Gonzalez v. Att'y Gen.*, 506 F.3d 274, 278 (3d Cir. 2007).[3] A petitioner can rebut this presumption by submitting contrary evidence, such as a sworn affidavit from the intended recipient supported by circumstantial evidence corroborating the claim of non-receipt. *Id.* at 280.

In the instant case, USCIS's file contains a copy of a Notice of Certification, dated October 5, 2012 and addressed to the petitioner, with a copy to counsel. The copy of the notice establishes a presumption that the petitioner and counsel received the notice that USCIS sent by ordinary mail. The record of proceedings does not contain any returned or undeliverable mail, which might indicate that the addresses on record at the time of certification were incorrect.

submits sworn affidavits from the petitioner's chief executive officer (CEO) and counsel, stating that the petitioner and counsel did not receive the notice. But does not cite any

[3] The precedent decisions of U.S. Courts of Appeal with jurisdiction over the area of intended employment bind the AAO in visa petition proceedings. *See, e.g., Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989). In the instant case, the area of intended employment, as stated on the labor certification, is Newark, Delaware, which falls under the jurisdiction of the U.S Court of Appeals for the Third Circuit.

circumstantial evidence supporting its claim of non-receipt as the Third Circuit's holding in *Santana Gonzalez* requires.

Moreover, even if USCIS had failed to fulfill the regulation at 8 C.F.R. § 103.4(a)(2), proceedings may be invalidated only where the regulation provides a benefit to the alien and the violation prejudiced an interest that the regulation was designed to protect. *Calla-Collado v. Att'y Gen. of U.S.*, 663 F.3d 680, 684 (3d Cir. 2011) (citing *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980)).

Here, the Notice of Certification indicated the director's approval of the petition. has not established that its claimed inability to brief the underlying accreditation issue on certification prejudiced the petitioner. Assuming that established itself as a successor-in-interest to the petitioner, also has not explained why its ability to submit a motion to reopen and/or reconsider the AAO's decision on certification would not be an appropriate remedy for a violation of 8 C.F.R. § 103.4(a)(2).

Indeed, since the AAO issued its decision on certification more than 9 months ago, has not addressed the underlying accreditation issue, despite opportunities to submit a brief and/or evidence with its "appeal" and with its response to the AAO's NOID. As discussed in the NOID, Streamline indicated that it would brief the issue within 30 days of filing its "appeal." However, the AAO received no brief or additional evidence before it issued its NOID. Streamline has not taken advantage of prior opportunities to be heard. The record of proceeding fails to establish a beneficial reason to remand this matter for recertification, further delaying these proceedings and burdening administrative resources.

Conclusion

In summary, the AAO finds that has not established itself as a successor-in-interest to the petitioner. Therefore, is not an affected party in these proceedings. As "appeal" was improperly filed, the AAO must reject it pursuant to the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(*1*).

ORDER: The filing is rejected.